



# Recent Development of the Jurisprudence Concerning the Delimitation of the Continental Shelf beyond 200 Nautical Miles

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## Introduction

### ▶ The Delimitation of the Continental Shelf beyond 200 M as a Modern Sphinx: Three Issues

1. The entitlement to the continental shelf beyond 200 nautical miles (M) that extends within 200 M from the baselines of another State
  - *The 2023 Nicaragua v. Colombia case*
2. The relationship between the Commission on the Limits of the Continental Shelf (CLCS) and an international court or tribunal
  - *The 2023 Mauritius/Maldives case*
3. The delimitation methodology



## The *Mauritius/Maldives* Case

### The Standard of Significant Uncertainty

#### ▶ The *Bangladesh/Myanmar* case

‘Notwithstanding the overlapping areas indicated in the submissions of the Parties to the Commission, the Tribunal would have been hesitant to proceed with the delimitation of the area beyond 200 nm had it concluded that there was **significant uncertainty** as to the existence of a continental margin in the area in question’ (ITLOS Reports 2012, 115, para. 443).

#### ▶ The *Mauritius/Maldives* case

‘The Special Chamber will apply **the standard of significant uncertainty** in the present case’ (para. 433).

# The *Mauritius/Maldives* Case

## The Standard of Significant Uncertainty

### ► Two Reasons

#### 1. To minimize the risk of conflicts between the views of the CLCS and ITLOS

‘It notes that this standard serves to minimize the risk that the CLCS might later take a different position regarding entitlements in its recommendations from that taken by a court or tribunal in a judgment’ (para. 433).

#### 2. The safeguard of the Area

‘[I]n maritime delimitation cases, international courts and tribunals refrain from delimiting areas where the rights of other coastal States may be affected. Application of the standard of significant uncertainty affords similar protection to the interests of the international community in the Area and the common heritage principle’ (para. 453).

## The *Mauritius/Maldives* Case

### The Standard of Significant Uncertainty

#### ► The Scope of the Application of the Standard of Significant Uncertainty

- The *Bangladesh/Myanmar* judgment: The standard of significant uncertainty would not be applied to the circumstances where, like the Bay of Bengal, there is ‘uncontested scientific evidence’.
- The standard of significant uncertainty may come into play in the situation where scientific evidence regarding entitlements to a continental shelf beyond 200 M is contested by one of the disputing parties and/or scientific evidence is debatable or absent.

## The *Mauritius/Maldives* Case

### The Standard of Significant Uncertainty

#### ► The Effect of the Agreement between the Parties

- The 2021 *Somalia v. Kenya* case

‘[I]n their submissions to the Commission both Somalia and Kenya claim on the basis of scientific evidence a continental shelf beyond 200 nautical miles, and that their claims overlap’ (ICJ Reports 2021, para. 194).

‘[N]either Party questions the existence of the other Party’s entitlement to a continental shelf beyond 200 nautical miles or the extent of that claim’ (Ibid).

→The ICJ decided that it would proceed the delimitation of the continental shelf beyond 200 M.

# The *Mauritius/Maldives* Case

## The Standard of Significant Uncertainty

### ► The Effect of the Agreement between the Parties: Critiques

- Judge Donoghue's view

‘[T]he Court has scant evidence regarding the existence, shape, extent and continuity of any outer continental shelf that might appertain to the Parties.’ (Separate Opinion of President Donoghue, ICJ Reports 2021, 286-287, para. 4).

- Judge Robinson's view

‘[N]owhere in the Judgment is there any analysis of that content to show that the Court is satisfied that the necessary geological and geomorphological criteria have been met for the existence of a continental shelf beyond 200 nautical miles’ (Individual Opinion, Partly Concurring and Partly Dissenting, of Judge Robinson, ICJ Reports 2021, 329, para. 14).

→ Possibility of the application of the standard of significant uncertainty (?)

# The *Mauritius/Maldives* Case

## The Standard of Significant Uncertainty

### ▶ The Criterion for the Standard of Significant Uncertainty

- ITLOS Special Chamber's view

‘Given the significant uncertainty, the Special Chamber is not in a position to determine the entitlement of Mauritius to the continental shelf beyond 200 nm in the Northern Chagos Archipelago Region’ (para. 450).

‘[I]n the circumstances of this case, it would not be appropriate to arrange for such an [expert] opinion’ (para. 454).

- Judge Hider's view

‘In my view, an expert opinion would have served to strengthen the scientific and technical basis for the Special Chamber's conclusions with respect to the second and third routes advanced by Mauritius...’ (Declaration of Judge Heider, para. 30)



## *The Nicaragua v. Colombia Case* **Assessment of Customary International Law**

### ► The ICJ's questions in its Order of 4 October 2022

- (1) Under customary international law, may a State's entitlement to a continental shelf beyond 200 nautical miles from the baselines from which the breadth of its territorial sea is measured extend within 200 nautical miles from the baselines of another State?
- (2) What are the criteria under customary international law for the determination of the limit of the continental shelf beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured and, in this regard, do paragraphs 2 to 6 of Article 76 of the United Nations Convention on the Law of the Sea reflect customary international law?

## The *Nicaragua v. Colombia* Case

### Assessment of Customary International Law

#### ► Assessment of General State Practice

- **Colombia:** Some 55 submissions could have extended within the 200-nautical-mile zones of other States, but 51 of those 55 submissions stopped at the 200-nautical-mile entitlements of neighbouring States when they could have gone further on technical grounds.
- **The ICJ:** ‘Taken as a whole, the practice of States may be considered **sufficiently widespread and uniform** for the purpose of the identification of customary international law’ (ICJ Reports 2023 (not yet reported), para. 77).
- **Critique by Judge Tomka:** ‘[T]he Judgment does not acknowledge, much less analyse, the existence of contrary State practice whereby States have claimed a continental shelf entitlement that extends within 200 nautical miles from the baselines of another State’ (Dissenting Opinion of Judge Tomka, para. 42).

# The *Nicaragua v. Colombia* Case

## Assessment of Customary International Law

### ► Assessment of General State Practice

- Judge Tomka

‘[S]ome inconsistencies and contradictions are not necessarily fatal to a finding of “a general practice”’ (Dissenting Opinion of Judge Tomka, para. 42).

- Judges Robinson

‘There is therefore practice that can be considered sufficiently widespread and uniform’ (Dissenting Opinion of Judge Robinson, para. 13).

- Judge Charlesworth

‘This practice appears to be a general one’ (Dissenting Opinion of Judge Charlesworth, para. 26).

# The *Nicaragua v. Colombia* Case

## Assessment of Customary International Law

### ► Assessment of *Opinio Juris*

- ICJ's view

‘The Court considers that the practice of States before the CLCS is *indicative of opinio juris*, ... In addition, given its extent over a long period of time, this State practice may be seen as *an expression of opinio juris*, which is a constitutive element of customary international law’ (ICJ Reports 2023 (not yet reported), para. 77).

‘[U]nder customary international law, a State’s entitlement to a continental shelf beyond 200 nautical miles from the baselines from which the breadth of its territorial sea is measured may not extend within 200 nautical miles from the baselines of another State’ (Ibid., para. 79).

# The *Nicaragua v. Colombia* Case

## Assessment of Customary International Law

### ► Critiques

- Judge Tomka

‘Today’s Judgment does not acknowledge the existence of clear expressions of *opinio juris* to the effect that a State’s entitlement to a continental shelf beyond 200 nautical miles *may* extend within 200 nautical miles from the baselines of another State’ (Dissenting Opinion of Judge Tomka, para. 59).

- Judge Xue

‘There is no evidence shown in the Judgment that those States parties, when restricting their claim in the submissions, believed that such restraint was required by a legal obligation or guided by law’ (Separate Opinion of Judge Xue, para. 47).

- Judge Robinson

‘[T]here is no basis for deriving *opinio juris* from State practice relied upon’ (Dissenting Opinion of Judge Robinson, para. 19).

# The *Nicaragua v. Colombia* Case

## Assessment of Customary International Law

### ► Flexible Assessment of *Opinio Juris* by the ICJ

#### • The *North Sea Continental Shelf* cases

The customary law character of the equidistance method: application of a rigid approach to the assessment of *opinio juris*

The equitable principles: No application of the rigid test of the two elements

→ *An opinio juris* as a flexible tool to either confirm or deny a rule of customary international law

#### • The *Nicaragua* case (Merits)

‘This *opinio juris* may,... be deduced from, inter alia, the attitude of the Parties and the attitude of States towards certain General Assembly resolutions,...’ (ICJ Reports 1986, 99-100, para. 188)

→ *An opinio juris* as a tool to safeguard a rule of customary international law reflecting community interests

# The *Nicaragua v. Colombia* Case

## Assessment of Customary International Law

### ► Two Approaches to the Assessment of *Opinio Juris*

- The rigid (or positivist) approach: Judges Tomka, Robinson, and Xue
- The flexible (or teleological) approach: The majority opinion

Judge Iwasawa's view:

'States usually do not curtail themselves when they believe that they have a right. If an issue is regulated by international law and States abstain from certain conduct in a way that is inconsistent with their own interests, it may be presumed that their abstention is motivated by a sense of legal obligation' (Separate Opinion of Judge Iwasawa, para. 12).

## The *Nicaragua v. Colombia* Case

### The Inter-relationship between the EEZ and the Continental Shelf

#### ► The ICJ's view in the *Libya/Malta* case

‘Although the institutions of the continental shelf and the exclusive economic zone are different and distinct, the rights which the exclusive economic zone entails over the sea-bed of the zone are defined by reference to the régime laid down for the continental shelf. **Although there can be a continental shelf where there is no exclusive economic zone, there cannot be an exclusive economic zone without a corresponding continental shelf**’ (ICJ Reports 1985, 33, para. 34).

- The continental shelf as part of the EEZ: to separate the continental shelf from the superjacent waters within 200 M is inconsistent to the concept of the EEZ itself



# The *Nicaragua v. Colombia* Case

## The Inter-relationship between the EEZ and the Continental Shelf

- ▶ The exclusive nature of Sovereign Rights over the EEZ
  - The ITLOS Special Chamber's view in the *Mauritius/Maldives* case
    - ‘[N]either Party may claim or exercise sovereign rights or jurisdiction with respect to the exclusive economic zone or the continental shelf within the 200 nm limit of the other Party on the latter's side of the boundary’ (para. 274).

## The *Nicaragua v. Colombia* Case

### The Inter-relationship between the EEZ and the Continental Shelf

▶ The distance criterion as the only legal title to the continental shelf within 200 M

- The ICJ's view in the *Libya/Malta* case

‘[W]here verification of the validity of title is concerned, since, at least in so far as those areas are situated at a distance of under 200 miles from the coasts in question, **title depends solely on the distance from the coasts** of the claimant States of any areas of sea-bed claimed by way of continental shelf, and the geological or geomorphological characteristics of those areas are completely immaterial’ (ICJ Reports 1985, 35, para. 39).

# The *Nicaragua v. Colombia* Case

## The Inter-relationship between the EEZ and the Continental Shelf

- ▶ The Integrity between the EEZ and the Continental Shelf
- The ICJ's view in the 1985 *Libya/Malta* case

‘[T]he two institutions—continental shelf and exclusive economic zone—are linked together in modern law’ (ICJ Reports 1985, 33, para. 33).
- Judge Oda's view in the *Tunisia/Libya* case

‘Article 56, paragraph 3, should be interpreted to mean that the régime of the exclusive economic zone will incorporate, in principle, the whole regime of the continental shelf’ (Dissenting Opinion of Judge Oda, ICJ Reports 1982, 234-235, para. 130).

## **The *Nicaragua v. Colombia* Case**

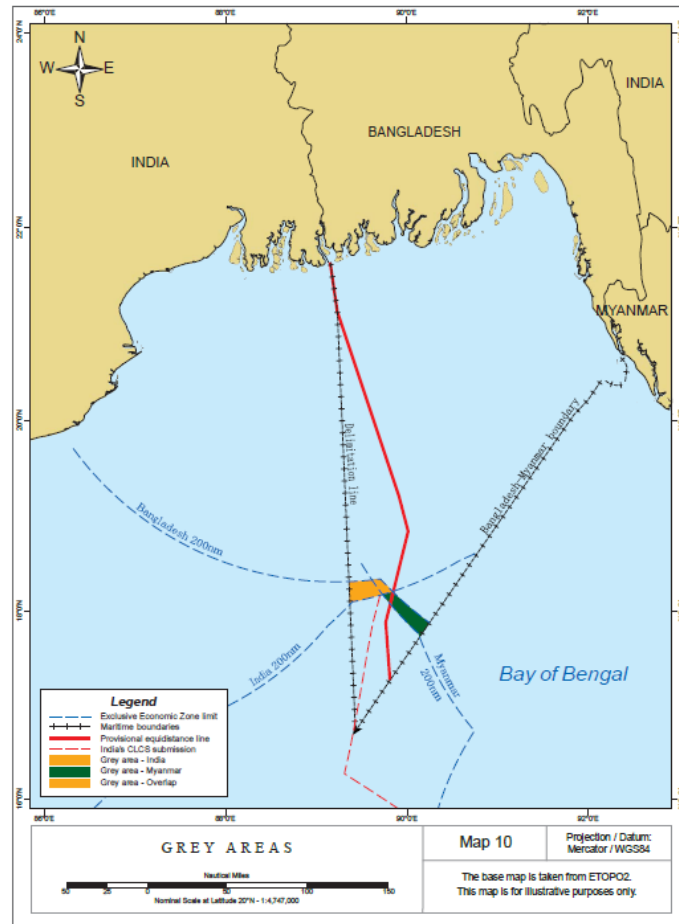
### **The Inter-relationship between the EEZ and the Continental Shelf**

- ▶ The Integrity between the EEZ and the Continental Shelf
- Judge Iwasawa's view in the 2023 *Nicaragua v. Colombia* case

‘[T]he régime of the exclusive economic zone affords a strong basis for the conclusion that the outer continental shelf of a State may not extend within 200 nautical miles of another State’ (Separate Opinion of Judge Iwasawa, para. 7).

## The *Nicaragua v. Colombia* Case The Grey Area

► The Grey Area: the marine space beyond the 200 M limit of one State but within that of the other State yet on the side of the former State of the maritime boundary



Source: The *Bangladesh v. India* case, Award of 7 July 2014, p. 159.

<https://pcacases.com/web/sendAttach/383>

# The *Nicaragua v. Colombia* Case

## The Grey Area

### ► The ICJ's view

‘In the two *Bay of Bengal* cases, the use of an adjusted equidistance line in a delimitation between adjacent States gave rise to a “grey area” as an **incidental result** of that adjustment. ... The Court considers that the aforementioned decisions are of no assistance in answering the first question posed in the present case’ (para. 72).

### ► Judge Xue's view

‘[T]he “grey area”, albeit incidental in nature and small in size, is in itself a piece of hard evidence that disproves at least the inseparability of the two zones in the maritime delimitation’ (Separate Opinion of Judge Xue, para. 27).

## The *Nicaragua v. Colombia* Case

### The Grey Area

#### ► The ITLOS Special Chamber's view in the *Mauritius/Maldives* case

‘[N]either Party may claim or exercise sovereign rights or jurisdiction with respect to the exclusive economic zone or the continental shelf within the 200 nm limit of the other Party on the latter's side of the boundary. Therefore, the boundary has **the effect of rendering moot** the question of delimitation of the area of overlap between the claim of the Maldives to a continental shelf beyond 200 nm and the claim of Mauritius to a 200 nm zone’ (para. 274).

#### ► Judge Charlesworth's view in the *Nicaragua v. Colombia* case

‘[U]nder the applicable rules on maritime delimitation, an entitlement to an extended continental shelf in principle **shall be given no effect** in so far as it overlaps with another State's entitlement to a 200-nautical-mile zone’ (Dissenting Opinion of Judge Charlesworth, para. 31).

## The *Nicaragua v. Colombia* Case

### The Grey Area

#### ▶ Dr. Rao's view in the *Bangladesh v. India* case

‘The creation of a grey area is entirely contrary to law and the policies underlying the decision taken in UNCLOS to create the EEZ as one single, common maritime zone within 200 nm which effectively incorporates the regime of the continental shelf within it’ (Concurring and Dissenting Opinion of Dr. P.S. Rao para. 24).

#### ▶ Judge Lucky's view in the *Bangladesh/Myanmar* case

‘[T]he result of a strict interpretation of the law set out in Parts V and VI of the Convention prohibits any allocation of one area to the other’ (Dissenting Opinion of Judge Lucky, ITLOS Reports 2012, 285).



## Conclusion

### 1. The ICJ's approach in the *Nicaragua v. Colombia* case

Under customary international law, a State's entitlement to a continental shelf beyond 200 M may not extend within 200 M from the baselines of another State.

### 2. The ITLOS Special Chamber's approach in the *Mauritius/Maldives* case

No legal effect shall be given to the entitlement to the continental shelf beyond 200 M when it extends within 200 M from the baselines of another State.

→ Prevention of complex issues arising from the separation of legal regimes governing the seabed/subsoil and its superjacent waters